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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EVAN GOULD, Defendant and Appellant.	C081040 (Super. Ct. No. 15F00269)

A jury found defendant Michael Evan Gould guilty of second degree robbery. In a bifurcated proceeding, the trial court found true allegations that defendant had a prior strike conviction and a prior prison term. The trial court denied defendant's request to dismiss the prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and sentenced him to 12 years in prison.

Defendant now contends the trial court abused its discretion in (1) excluding evidence admissible under Evidence Code section 356 (the rule of completeness), and (2) denying his request to dismiss the prior strike conviction.

We need not decide whether the trial court abused its discretion in excluding the proffered evidence because the evidence came in anyway and defendant has not established the requisite prejudice. Moreover, the trial court did not abuse its discretion in denying defendant's request to dismiss the prior strike conviction. We will affirm the judgment.

BACKGROUND

Wilson N., an individual with disabilities including attention deficit disorder and comprehension disorder, was residing with an in-home service provider responsible for taking care of his daily needs. On the morning of defendant's arrest, Wilson left his home around 7:30 a.m. and took a light rail train to attend a meeting. As he was walking from the light rail station, a man who Wilson later identified as defendant ordered him to hand over his cell phone. Defendant grabbed Wilson's wrist but Wilson resisted and told defendant, "No, I am not giving my phone up to you." In response, defendant said, "If you don't give me the phone, I'm going to stab you." Defendant then pulled out a gray/silver pocketknife and pointed it at Wilson's stomach. Wilson later told police the blade was three to four inches long, but at trial he testified the blade was an inch and a half to two inches long. After Wilson handed over his red Samsung cell phone, defendant ran across the street and entered an apartment. Wilson immediately went into a nearby store and asked an employee to call the police.

On cross-examination, Wilson claimed he did not know defendant and had never met him. When defense counsel questioned Wilson's timeline of events by pointing out that the 911 call occurred at around 11:45 a.m., Wilson conceded that he might have misjudged what time he left his house.

At 11:55 a.m., Sacramento Police Officer Jon Sallee was dispatched to the location of the reported robbery. When he arrived, he noticed Wilson was visibly shaken and extremely nervous. Wilson described defendant's appearance and showed Officer Sallee the apartment defendant entered. Sacramento Police Officer Ryan Cleveringa was also dispatched to the location of the reported robbery. When he arrived, he spoke with defendant outside his apartment. Defendant told Officer Cleveringa the cell phone in question was located inside his backpack in the apartment. Eventually, Officer Cleveringa searched the backpack and found a cell phone and a knife. Officer Cleveringa described the knife as "a silver butane lighter with a corkscrew and a small 1.5-inch blade." He showed the knife to Wilson, who confirmed it was the knife that defendant pointed at him. Officer Sallee also showed Wilson the cell phone discovered by Officer Cleveringa. Wilson confirmed it was the red Samsung phone taken by defendant. When Officer Sallee called the number provided by Wilson, the phone rang.

Emma B. testified for the defense, saying she rented a room to defendant and met Wilson for the first time the night before defendant's arrest. She claimed Wilson was at her apartment when she went to bed at around 11:30 p.m., and he returned to the apartment the morning after defendant called him. She said defendant and Wilson met outside her apartment for about 20 to 30 minutes.

Emma's son Gary said Wilson was his best friend and he last saw Wilson at his mother's apartment with defendant the night before defendant's arrest. He added that Wilson had been to his mother's apartment on one other occasion several months earlier.

Wilson, Emma, Gary and defendant were all clients of Alta California Regional Center, which provides assistance to individuals with disabilities. Defendant said he met Wilson for the first time the night before he was arrested. He said Wilson wanted to smoke some of defendant's methamphetamine but did not have any money. According to defendant, he purchased Wilson's cell phone with drugs, but Wilson left the apartment with the phone when defendant went to the bathroom.

Defendant said he called Wilson at around 9:30 a.m. the next morning and asked why he had stolen his cigarettes and cell phone. According to defendant, Wilson said he did not steal the cigarettes but he had the phone. Defendant responded, "I can see you have the phone. You are answering the phone. Your hooker girlfriend left a message. If you want the message, bring back the phone you just stole." Defendant testified Wilson came to his apartment shortly after they talked and returned the phone. Defendant denied threatening Wilson with a knife. He said he used the torch lighter on the knife to smoke methamphetamine.

On cross-examination, defendant admitted smoking about two bowls of methamphetamine the night before he was arrested and admitted lying when he told Officer Cleveringa he bought Wilson's cell phone for $50. On redirect, defendant explained he lied because he did not want to get himself or Emma in trouble for having methamphetamine in the apartment.

Kevin Baker, a criminal investigator for the public defender's office, testified on behalf of defendant. He said Wilson told him defendant threatened him with a blue or gray box cutter.

Officer Cleveringa testified in rebuttal. He said defendant told him he purchased Wilson's cell phone for $50 and the phone was in his backpack inside the apartment. According to Officer Cleveringa, he did not see any evidence of methamphetamine use inside defendant's apartment.

The jury found defendant guilty of second degree robbery (Pen. Code, § 211, subd. (b)(1))[1] but found untrue the allegation that he had personally used a deadly weapon in the commission of the robbery. In a bifurcated proceeding, the trial court found true allegations that defendant had a prior serious felony conviction (§§ 1192.7,

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[1] Undesignated statutory references are to the Penal Code.

subd. (c), 667, subd. (a)), which qualified as a strike under California's three strikes law (§§ 667, subd. (b)-(i), 1170.12), and had served a prior prison term (§ 667.5, subd. (b)).

Prior to sentencing, defendant asked the trial court to dismiss his prior strike conviction under *Romero*. The trial court denied defendant's *Romero* request and sentenced him to an aggregate term of 12 years in state prison.

DISCUSSION

I

Defendant contends the trial court abused its discretion in excluding evidence admissible under Evidence Code section 356 (the rule of completeness).

On direct examination, the prosecutor asked Officer Cleveringa how he determined that the backpack containing the knife and cell phone belonged to defendant. Officer Cleveringa said defendant told him the cell phone was located inside defendant's backpack in the apartment and that when he searched the backpack he found a cell phone and knife.

In preparing for cross-examination, defense counsel argued he should be able to elicit from Officer Cleveringa that defendant said he purchased the cell phone from Wilson. The prosecutor disagreed and the trial court requested briefing on the issue. After considering the parties' briefs, the trial court ruled the testimony was inadmissible: how defendant acquired the cell phone was not the same subject as the location of the phone or ownership of the backpack.

A witness may be cross-examined on any matter within the scope of direct examination. (Evid. Code, § 773.) Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

This provision "is sometimes referred to as the statutory version of the common law rule of completeness. [Citation.] According to the common law rule: ' "[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." [Citation.]' [Citation.]" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) The purpose of the rule "is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

The California Supreme Court has "taken a broad approach to the admissibility of the remainder of a conversation under Evidence Code section 356." (*People v. Clark* (2016) 63 Cal.4th 522, 600.) " ' "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. . . .' [Citation.]" ' [Citation.] Further, the jury is entitled to know the context in which the statements on direct examination were made." (*People v. Harris* (2005) 37 Cal.4th 310, 334-335, italics omitted.) We review the trial court's determination of whether or not to admit evidence under Evidence Code section 356 for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235.)

But even if the trial court improperly excluded the evidence, defendant must also show prejudice: that it is reasonably probable he would have received a more favorable

result had the evidence been admitted. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 156-157, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant argues the trial court's error is subject to review under the beyond-a-reasonable-doubt standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]. Under either standard, we need not decide whether the trial court abused its discretion because defendant has not established the requisite prejudice.

Defendant himself testified about how he acquired Wilson's cell phone, saying he purchased it with drugs. On cross-examination and redirect examination, defendant admitted lying to Officer Cleveringa when he said he purchased Wilson's cell phone for $50. During rebuttal, the prosecutor specifically asked Officer Cleveringa to recount his initial conversation with defendant. Officer Cleveringa testified defendant said he bought Wilson's cell phone for $50, and that it was located inside his backpack in the apartment. Under these circumstances, any evidentiary error by the trial court was harmless. Defendant testified that he purchased the cell phone, and the portion of the conversation between him and Officer Cleveringa about how defendant claimed to have acquired the phone was ultimately placed into evidence. The record does not support defendant's assertion that the evidence suggested he admitted unlawfully acquiring the cell phone.

II

Defendant also contends the trial court abused its discretion in denying his request to dismiss the prior strike conviction. According to defendant, the trial court should have granted his request for the following reasons: (1) he has a mental disability and a low IQ; (2) he suffers from mental illness, takes antipsychotic medication, and was not provided necessary support; (3) the nature of the current offense is less serious than his 2006 strike conviction for committing a lewd or lascivious act upon a child by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim (§ 288, subd. (b)(1)); (4) the prior strike conviction is remote in time; and (5) other than the prior

strike conviction, defendant only has two misdemeanor convictions for crimes in 2006. We find no abuse of discretion.

The three strikes law " 'establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) The trial court considers "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Dismissal of a prior strike is a departure from the sentencing norm. (*Carmony, supra*, 33 Cal.4th at p. 378.) "[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Id.* at p. 375.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Where the trial court, aware of its discretion, " 'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

Here, the trial court was aware of its discretion to dismiss defendant's prior strike conviction and it did not abuse its discretion in declining to do so. The trial court considered the record and determined defendant did not fall outside the three strikes scheme. It said there was not a significant period where defendant did not engage in some kind of criminal activity and after engaging in very serious criminal conduct, he did not lead a crime-free life. In sentencing defendant, the trial court found there were no mitigating circumstances but a number of aggravating circumstances. (Cal. Rules

of Court, rule 4.421(a) & (b).) Under the circumstances, the trial court's decision was not so irrational or arbitrary that no reasonable person could agree with it.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
BUTZ, J.